



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/19811/2018

**THE IMMIGRATION ACTS**

Heard at Field House  
On Tuesday, 18 May 2021

Decision & Reasons Promulgated  
On Tuesday, 27 July 2021

Before

UPPER TRIBUNAL JUDGE McWILLIAM  
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LH

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr E Tufan, Home Office Presenting Officer

For the Respondent: Mr C Lam, Counsel instructed by David Tang & Company

**DECISION AND REASONS**

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings

1. The Appellant is a citizen of China. His date of birth is 28 November 1975. He has been anonymised in these proceedings by the First-tier Tribunal.<sup>1</sup> There is no reason for us to interfere with this. The Appellant lives in the United Kingdom with his wife, XW. She is a citizen of China. She has a derivative right to reside here as the mother of their two British citizen children (G and C), born on 15 January 2011 and 15 March 2012.
2. The Appellant claims to have arrived in the UK in April 1997. He made a claim for asylum in May 1997. The application was refused by the Secretary of State on 16 July 1997. His appeal against that decision was dismissed by a Special Adjudicator in 1998. On 16 December 2010 the Appellant was granted ILR.
3. On 30 October 2015 the Appellant was convicted of two counts of employing adults subject to immigration control. XW was a co-defendant in the proceedings. On 9 December 2015 they were sentenced to thirteen months' imprisonment on each count to run concurrently. The Secretary of State served a decision to deport the Appellant (dated 18 January 2016). The Appellant made representations. In a decision dated 22 September 2018 the Respondent refused the Appellant's human rights claim. A deportation order was signed on 20 September 2018.
4. The Appellant appealed against the decision of 22 September 2018. His appeal was allowed by the First-tier Tribunal (Judge Wilding) in a decision promulgated on 9 September 2019. Upper Tribunal Judge Mandalia set aside the decision of the First-tier Tribunal to allow the Appellant's appeal against the Secretary of State's decision to deport the Appellant following his criminal conduct on Article 8 grounds. His decision ("the error of law decision") is appended to this document (Appendix A). The appeal came before us for a rehearing.
5. On 14 February 2016 the Appellant and XW made an application for a derivative residence card as primary carers of a British citizen who was resident in the United Kingdom (their two children). The applications were refused by the Secretary of State. The Appellant and his wife appealed. Their appeals were dismissed. However, in respect of XW, the Secretary of State in a letter of 22 September 2018, changed her position. She stated: -

"Having taking account of your criminal conduct to date, the Secretary of State had decided that your deportation is conducive to the public good. However, the Secretary of State will not be taking steps to deport you at the present time. This is because there is currently a legal barrier which prevents you from being deported. You are the primary carer for two British citizens and children. Deporting you and your husband, LH, together would force the children to leave the UK and this would be in contravention of the European Economic Area (EEA) Regulations. You are no longer required to report as previously required."

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<sup>1</sup> All asylum appeals are anonymised in the First-tier Tribunal in accordance with Presidential Guidance Note No 2 of 2011 (First-tier Tribunal). UTIAC will follow the same general practice properly applying Upper Tribunal (IAC) Note No 1: Anonymity Orders.

6. In the same letter the Appellant's wife was informed that she remains liable to deportation under the provisions of the Immigration Act 1971 and could face deportation action if she comes to the adverse attention of the Respondent.
7. Upper Tribunal Judge Mandalia concluded that Judge Wilding made a material error of law. He observed that it was unfortunate that the First-tier Tribunal had not been provided with a copy of the letter dated 22 September 2018 from the Secretary of State to the Appellant's wife. He was not made aware of it. The First-tier Tribunal's consideration of s.117C(5) of the 2002 Act proceeded on the basis of a mistake as to fact that the Appellant's wife was not entitled to a derivative residence card as the parent of dependent children under the EEA Regulations. Upper Tribunal Judge Mandalia found that the mistake "played a material part in the judge's reasoning". He referred to the following findings of the First tier Tribunal.

"29. An additional fact which leads from the partner's lack of status is the fact that the Appellant's removal could require his children to leave the UK in contravention of the principles in Zambrano, this is presumably why the Respondent's guidance emphasises that the decision should not be taken if the partner does not have leave to remain. The Respondent has not sought to clarify her status prior to the hearing and save for Ms Ololade's concession that she would not be removed there is nothing to confirm her lawful status. It is also of note that the appeal before the First-tier Tribunal in January 2018 of the Appellant's partner was dismissed, I was told by Mr Lam, on the basis of the Appellant being present in the UK and able to care for the children.

30. The uncertainty as to the partner's status in conjunction with the Respondent's own guidance, as well as the issue as to the Zambrano lends further weight to the consideration as to whether there are unduly harsh circumstances, in my view there are such circumstances. Should the Appellant be removed to China then the two children will be left with their mother who has no immigration status, contrary to the Respondent's own guidance. However, it is more than that, even if Ms Ololade's submission that she will not be removed, the Appellant's partner could not work, she cannot provide therefore for the household. In my judgment, weighing all of the above into the equation, the circumstances which the Appellant's deportation would lead to would be unduly harsh."

8. Upper Tribunal Judge Mandalia stated as follows: -

"30. Where there is a mistake as to fact, a successful appeal in such circumstances is not dependent on the demonstration of some failing on the part of the FtT. An error of law may be found to have occurred in circumstances where some material evidence, through no fault of the FtT, was not considered, with resulting unfairness. I am satisfied that that is what has happened here, and the decision of the First-tier Tribunal must be set aside.

31. As to disposal, the appropriate course is for the appeal to remain in the Upper Tribunal. I preserve the finding made by Judge Wilding, at [23], that it would be unduly harsh for the children to go to China. I direct that:
  - (a) The Appellant shall file and serve any further evidence that he seeks to rely upon, within 21 days of this decision being sent to the Appellant.
  - (b) the matter should be listed for a resumed hearing on the first available date after 28 days."

### **The Decision of the First-tier Tribunal**

9. Judge Wilding found that there were no credibility issues and no dispute as to the factual circumstances. He said that both witnesses (the Appellant and his wife) gave evidence in a clear manner and their evidence was credible.
10. Judge Wilding considered the best interests of the Appellant's two children. The children were born here and attend primary school. The judge recorded the evidence that they have relationships with teachers and children alike and that they understand and speak some Chinese, however, they are not fluent and often answer in English. The children have never lived in China and last visited there in 2015. They have grandparents there and extended family. Both children are in good health and there were no concerns in that regard.
11. Both children have lived under Social Services care before whilst their parents were in prison, however, there were no issues in relation to their care upon their parents' release. They were promptly returned to them. Judge Wilding accepted the evidence and concluded that the family is "clearly in a living and stable family unit". The judge found "without hesitation" that the children's best interests are for them to remain in the UK with both of their parents (at paragraph 17).
12. Judge Wilding said as follows: -

"Turning to the question of separation I consider this a finely balanced case. I place weight on the best interests of the children for their father to remain in the UK with them and their mother as one family unit. I note the importance highlighted in KO (Nigeria) for a degree of harshness going beyond what a child would usually face if a parent were deported. In my view there are several features which when considered as a whole renders the Appellant's deportation and separation from his partner and children as unduly harsh."

### **The Hearing**

13. At the hearing on 18 May 2021 a Mandarin interpreter had been booked in anticipation that the Appellant and his wife would be giving evidence. Unfortunately, the interpreter failed to attend the hearing. The Tribunal made efforts to find another interpreter. Eventually an interpreter who was able to attend the

hearing remotely was located. However, technical problems prevented the hearing going ahead. At about 11.45 am it became clear that we were not going to be able to benefit from the assistance of an interpreter for the hearing. Although Mr Lam indicated that his client could speak some English it was clear to us when we spoke with him that he could not understand the proceedings. It was not appropriate for XW, Appellant's wife and a witness in the proceedings, to interpret for him. Mr Lam indicated that he would be able to interpret for the Appellant, however, this was not in our view appropriate.

14. We were not satisfied that the Appellant was able to understand the proceedings. Mr Tufan indicated that he did not challenge the evidence of the Appellant or his partner in the light of the findings of the First-tier Tribunal. Both parties agreed, in the light of Mr Tufan's concession, that the matter could proceed by way of written submissions. We adjourned the hearing and made the following directions: -
  - (1) The Secretary of State must serve and file written submissions not later than 1 June 2021 (clearly marked for the attention of UTJ McWilliam and DUTJ Jolliffe).
  - (2) Any response by the Appellant must be served and filed not later than 9 June 2021 (clearly marked for the attention of UTJ McWilliam and DUTJ Jolliffe).
15. Mr Lam indicated to us at the hearing that his skeleton argument was to stand as written submissions. The Appellant relied on the bundle that was before the First-tier Tribunal (64 pages) and which contains his and XW's witness statements (both dated 21 August 2019). There was so a supplementary bundle (10 pages) which contains the more recent statements of the Appellant and XW (dated 4 May 2021) and documents relating to the Appellant's employment and the children's education.

### **The Appellant's Criminality**

16. The PNC (RB/BB7) indicates that on 9 December 2015 the Appellant was convicted of employing a person knowing they are an adult subject to immigration control. He was convicted of two offences between 30 September 2014 and 12 February 2015. He pleaded guilty to both offences. He was sentenced to thirteen months' imprisonment. He was disqualified from being a company director for six years and ordered to pay a victim surcharge of £100.
17. The judge sentencing the Appellant stated: -

"On 11 April 2011 Immigration Officers went to the East Harling Restaurant and discovered a number of illegal workers, three in number, and on 2 June a notice, a civil notice was served of £5,000 per employee ...

... About a month after the Immigration Officers attended the East Harling Restaurant, they went to your restaurant in South Walsham, and two suspected illegal immigrants were working ...

... They then came back again on 16 October with a warrant and discovered a Malaysian national working as a cook, ...

...

It's quite plain to me that you totally ignored this legislation, and employ, no doubt for financial gain, illegal immigrants, and that, as I have said, in my judgment, was purely a financial operation, because it meant you had to pay them very little, if anything at all; they were happy to work just to have somewhere to sleep and something to eat, and no doubt a little bit of cash on the side. These people who you were exploiting are extremely vulnerable. They may well be illegal entrants, or illegal in terms of overstaying, and things of that sort, but they are very vulnerable people who, in my judgment, you were preying on."

### **The Appellant's Evidence**

18. The Appellant's evidence can be summarised. He and his XW are remorseful. They will never commit further offences. He was a person of good character before 2015. They accepted full responsibility for employing illegal immigrants and they accept that "ignorance of the law was no excuse".
19. It was very difficult for the couple's two children when they were in prison. During the period of incarceration, the children were cared for by the Social Services. They were overwhelmed with emotions when they were reunited. The family has been trying to rebuild their family life since release. The children are beginning to return to normality. Deportation would be detrimental to them.
20. The decision to deport the Appellant is devastating to his children and partner. They are a close family. They jointly care for the children. The Appellant works part-time as a chef at a Chinese takeaway. He works from 4pm to 8.30pm. His children get up at about 7.30am and he and his XW prepare breakfast for them. When he arrives home from work the children are still awake. He chats and plays with before they go to bed. He encourages his children to study hard so that they can have a better future. At the weekend the family spends quality time together. He would like to work full-time.
21. The children are emotionally attached to both parents. The adverse effects and emotional trauma that his children would endure on separation is difficult to express in words. Their lives would be turned upside down again.

### **The Evidence of XW**

22. XW's evidence can be summarised. As a result of imprisonment, the couple lost their business and their children suffered enormously because they had to be taken into the care of the Social Services. She believes that the punishment imposed by the Crown Court sufficient.

23. The Appellant is a hardworking and caring father. The children are emotionally attached to him. The family wants normality and to be able to move on. The children are at a “tender age”. They look to the Appellant for guidance and support. They are emotionally attached to both parents in equal measure. The family has rebuilt family life since they were released from prison. It would be emotionally devastating for them to lose their father again. It would not be possible for the Appellant to visit the UK to see his children for a long period of time. In addition, the family would suffer without the Appellant’s income and support. It would not be possible for her to take the children to China to visit him. It would be a real physical separation which would last for many years. They were of good character before these offences were committed.

### **The Appellant’s Skeleton Argument**

24. The Appellant’s son and daughter are “at a tender age”. The Appellant plays a crucial part in their lives. He is financially responsible for the family, which also receives financial support from the state. The children would not be able to see their father for a very long time if he were deported. The impact on them would be traumatic. The Appellant’s partner would have difficulties bringing up the children on her own without the emotional and physical support of the Appellant. They would face financial difficulty. The effect on their educational wellbeing is more severe than it would be if they were adolescents.

25. Since 2016, when the Appellant and XW were released from detention, family life has resumed with the children. Attention is drawn to paragraph 3 of the Appellant’s most recent statement in which he states, “the pain of missing the children was far greater than the loss of [their] liberty”. They have already experienced upheaval by being taken into care by the Social Services.

26. It would be very traumatic for them to be again separated. The Appellant relies on HA (Iraq) v SSHD [2020] EWCA Civ 1176, specifically, paragraphs 39 – 58. The Appellant also relies on NA (Pakistan) v SSHD [2016] EWCA Civ 662 and Unuane v United Kingdom [2020] ECHR 832 in which the European Court stressed the necessity of carrying out a “separate balancing exercise” when assessing proportionality under Article 8 and that this is not limited to searching for “very compelling circumstances” in the case of a serious offender who has been sentenced to four years or more.

27. The offence committed by the Appellant is not one that involved sex, drugs or violence. This was his first offence. He has not been in trouble with the police since his release in 2016. He is at low risk of reoffending, taking into account the OASys assessment of 10 June 2016. He has had leave to remain in the UK since 2010. The Appellant received a sentence of thirteen months, the lower end of the scale as regards medium offenders. Peter Jackson LJ in HA (Iraq) stated that “a decision that does not give primary consideration to the children’s best interests will be liable to be set aside”. The Appellant relies on Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39.

### **The Respondent's Written Submissions (received on 26 May 2021)**

28. On 29 January 2021 XW was granted limited leave to remain in United Kingdom by the Secretary of State pursuant to paragraph EU3 of Appendix EU to the immigration rules (IR). This is also referred to as pre-settled status. She can therefore work and study here. She can use the NHS and access public funds such as benefits and pensions depending on eligibility. She can travel in and out of the UK.
29. The point made by Mr Lam that there needs to be a separate balancing exercise or Article 8 proportionality assessment (per Strasbourg case law) is not accepted. Reliance is placed by the Appellant on Unuane v UK at [15] of the skeleton argument it is asserted that "a separate balancing exercise" should be conducted when assessing proportionality under Article 8".
30. It is submitted, however, that after a detailed analysis of domestic case law and the court in Unuane v UK concluded that s. 117C of the 2002 Act provides for all relevant factors to be taken into account in the proportionality assessment and that, in considering whether "exceptional" or "very compelling circumstances" exist the authorities should have regard to proportionality test required by Strasbourg jurisprudence (and by implication domestic case law) as part of the overall consideration process.
31. It is clear from the evidence provided that the Appellant's children are doing quite well at school. It is also clear that they have no health concerns. In fact, there is nothing which distinguishes the children's circumstances from any other children whose parent faces deportation. There is no evidence from an Independent Social Worker (ISW) or any medical evidence concerning the impact of deportation on the children.
32. It is suggested that XW would face financial difficulty and that this will be greatly felt by children. This is potentially faced by all those children whose foreign criminal parent faces deportation. Such circumstances cannot reach the level of harshness to become unduly as upheld by the Supreme Court in KO (Nigeria) & Others v SSHD [2018] UKSC 53. Furthermore, XW has status in and is allowed to work. She is also entitled to benefits from the social services, if needed. Moreover, the Court of Appeal in BL (Jamaica v SSHD) [2016] Civ 357 concluded that the Tribunal is entitled to work on the basis that the Social Services would perform their duties under the law [see [53]].
33. It was confirmed at the hearing (after Mr Lam took instructions) that the Appellant is currently the only parent who is working. This does not mean that the children's mother will not be able to work. Furthermore, Lord Justice Peter Jackson with whom other members of the court agreed opined, as follows, in TD (Albania) v SSHD [2021] EWCA Civ 619 at [35]:



I reject the submission that the FTT was bound to reach a different conclusion about undue harshness because of the loss of family life and the absence of a breadwinner. These are hard consequences for this family but the tribunals did not err in finding that they were justified by the public interest in the deportation of foreign criminals, which it rightly described as very significant.

34. TD (Albania) postdates HA (Iraq), which is heavily relied upon by the Appellant and has been appealed by the Secretary of State. At [22] of TD (Albania), Peter Jackson LJ constructs the ambit of HA (Iraq) at [22] in the following terms:

The decision in HA (Iraq) does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinarieness. It affirms that this is not what KO, properly understood, requires.

35. The Court of Appeal in TD (Albania) considered domestic and Strasbourg case law, including Unuane v UK, and concluded that the Tribunal did not err in dismissing the appeal of that Appellant who was a persistent offender and had three children in UK.
36. The high threshold of unduly harshness was reiterated in LE (St Vincent And the Grenadines) v The Secretary of State for the Home Department [2020] EWCA Civ 505 (which predates HA Iraq). At paragraph 16 the Court of Appeal stated: -

Subsequent decisions of this Court have emphasised that "unduly harsh" requires the court or tribunal to focus on whether the effects of deportation of a foreign criminal on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of any foreign criminal faced with deportation: see for example per Holroyde LJ at [34] of Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213. As Irwin LJ said in OH (Algeria) v Secretary of State for the Home Department [2019] EWCA Civ 1763 at [63]:

As a matter of language and logic, this is a very high bar indeed.

37. Another Court of Appeal case which postdates, and analyses HA (Iraq) is KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385 where the Court of Appeal summarised its understanding of the test of undue harshness in s. 117C (5) NIAA 2002 as follows: -

"15. The meaning of "unduly harsh" in the test provided for by s.117C(5) has been authoritatively established by two recent decisions: that of the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273; and the decision of this court in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 117. It is sufficient to note the following without the need to quote the relevant passages:

- (1) *The unduly harsh test is to be determined without reference to the criminality of the parent or the severity of the relevant offences: KO (Nigeria) para 23, reversing in this respect the Court of Appeal's decision in that case, reported under the name MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 617, in which at paragraph*

26 Laws LJ expressed this court's conclusion that the unduly harsh test required regard to be had to all the circumstances including the criminal's immigration and criminal history.

- (2) "Unduly" harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent: KO (Nigeria) para 23.
- (3) That is an elevated test, which carries a much stronger emphasis that mere undesirability or what is merely uncomfortable, inconvenient, or difficult; but the threshold is not as high as the very compelling circumstances test in s. 117C (6): KO (Nigeria) para 27; HA (Iraq) paras 51-52.
- (4) The formulation in para 23 of KO (Nigeria) does not posit some objectively measurable standard of harshness which is acceptable, and it is potentially misleading and dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances; it is not possible to identify a base level of "ordinariness": HA (Iraq) paras 44, 50-53, 56 and 157, AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 at para 12.
- (5) Beyond this guidance, further exposition of the phrase will rarely be helpful; and tribunals will not err in law if they carefully evaluate the effect of the parent's deportation on the particular child and then decide whether the effect is not merely harsh but unduly harsh applying the above guidance: HA (Iraq) at paras 53 and 57. There is no substitute for the statutory wording (*ibid* at para 157)."

38. It is submitted that the effect of the Appellant's deportation on his two children will not be unduly harsh on the facts of this case.
39. Compelling circumstances have to be assessed in the light of the strength of public interest in deportation of foreign criminals. The Appellant is a middle category offender, having been sentenced to 13 months imprisonment. Underhill LJ at [92] of HA (Iraq) opined that the relative seriousness can be capable of being deployed at the second stage. He does however qualify this opinion in the next paragraph, at [93] opining that less serious offending "could" form an element in the analysis. He emphasised that he should not be misunderstood and emphasised that low sentence cannot in itself constitute very compelling circumstances for the purpose of s.117C (6). He adds in the same paragraph that this would be a subversion of the statutory scheme.
40. It is accepted that the Appellant has not committed any further offences. Underhill LJ stated at [141] of HA (Iraq) that positive rehabilitation cannot be excluded in the overall proportionality exercise, but he emphasised that it will not carry great weight on its own. He agreed with what Moore-Bick LJ said in Danso v SSHD [2015] EWCA Civ 596. The Court of Appeal in the very recent case of Jallow v SSHD [2021] EWCA Civ 788 analysed both HA (Iraq) and Danso v SSHD and emphasised the little weight that can be given to rehabilitation and the strength in the public interest when dismissing the appeal against the Upper Tribunal's decision to dismiss the Appellant's appeal in that case.

### **The Appellant's Response to the Respondent's Submissions**

41. Financial hardship for the Appellant's family as a result of deportation is only one aspect of unduly harsh test relied upon under s.117C (5). While XW could seek work during the children's school hours, it would mean that she would have to juggle between work and caring for her children. Given the fact that the children only resumed family life after the release of their parents in 2016, a second separation with their father would be all the more traumatic. It is conceivable that the separation with their father would have an adverse impact on their education. They are both doing very well at school as stated in their school reports. That is only because they have settled order of life with, and enjoy the company of, both parents. It is submitted that all the factors mentioned above cumulatively will meet the unduly harsh test.
42. A new argument is raised for the first time in the Appellant's written response to the Respondent's written submissions. It is submitted that this decision breaches the Zambrano principle. In Zambrano, both parents were facing removal but were both allowed to remain. It is respectfully submitted that that the ratio of Zambrano is that the parents of a 'Zambrano child' are allowed to remain.

### **The Legal Framework**

43. Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) applies. I must have regard to the considerations listed therein at subsections 117B and 117C of that Act. The Appellant is a foreign criminal as defined in 117(2) because he has been convicted of an offence and has been sentenced to a period of imprisonment of at least twelve months.
44. Section 117C sets out additional considerations involving foreign criminals:
  - 117C (1) The deportation of foreign criminals is in the public interest.
    - (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
    - (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
    - (4) Exception 1 applies where -
      - (a) C has been lawfully resident in the United Kingdom for most of C's life,
      - (b) C is socially and culturally integrated in the United Kingdom, and
      - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2."

45. Paragraphs 398 and 399 of the Immigration Rules correspond to Sections 117C (6) and (5) respectively.
46. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to make arrangements to ensure that her functions in relation to immigration are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.
47. In HA (Iraq) the Court of Appeal considered unduly harsh and the application of the guidance in KO (Nigeria). When considering what Lord Carnwath said at paragraph 23 of his judgment in KO (Nigeria) about the expression "unduly harsh" Underhill LJ stated as follows:

43. The starting point is that the question to which the reasoning is directed is whether the word 'unduly' imports a requirement to consider 'the severity of the parent's offence': that, as I have said, was the actual issue in the appeal. Lord Carnwath's conclusion is that it does not: see the sentence beginning 'What it does not require ...'. The reason why there is no such requirement is that the exercise required by Exception 2 is 'self-contained'. I should note at this point that it follows that it is irrelevant whether the sentence was at the top or the bottom of the range between one year and four: as Lord Carnwath says, the only relevance of the length of the sentence is to establish whether the foreign criminal is a medium offender or not.

45. Lord Carnwath then turns more particularly to the case of KO. After summarising the facts, at paras. 27-32 he reviews the previous case-law on the relative seriousness issue. He maintains the view on that issue which he had reached by reference to the statutory language (see above). The only part that is relevant for our purposes is para. 27, where he says:

'Authoritative guidance as to the meaning of 'unduly harsh' in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the 'evaluative assessment' required of the tribunal:

'By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe, or bleak. It is the antithesis of pleasant or

comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

It is clear that by describing it as 'authoritative' Lord Carnwath means to endorse the UT's self-direction in MK (Sierra Leone), which is consistent with his own explanation of the effect of 'unduly' at para. 23. He goes on to note that that self-direction was followed in the later case of MAB (USA) v Secretary of State for the Home Department [2015] UKUT 435.

46. Although it is not directly relevant for present purposes, I should note, because I shall have to return to it later, that immediately following that passage Lord Carnwath goes on to say:

'On the facts of that particular case [i.e., MK], the Upper Tribunal held that the test was satisfied:

'Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven-year-old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken West African state. No reasonable or right-thinking person would consider this anything less than cruel.'

This view was based simply on the wording of the subsection and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial.'

That is not quite as straightforward as it appears. The UT in MK considered both the scenario where the appellant's children accompanied him to Sierra Leone and the scenario where they stayed in the UK. The passage quoted by Lord Carnwath refers to the former scenario, and the UT's conclusion about it was obviously right. Lord Carnwath does not quote the UT's conclusion on the latter scenario, which it also found to be unduly harsh.

47. Finally, at paras. 33-36 Lord Carnwath considers the decision of the UT in KO itself. The essential facts were that KO was a Nigerian national who had entered the UK unlawfully in 1986 and had never leave to remain. He was married to a British citizen, with whom he had four children, themselves British citizens, born between 2009 and 2013. In August 2011 he had been sentenced to twenty months' imprisonment for conspiracy to defraud. It was common ground that if he were deported his wife and children would remain in the UK. In his decision UTJ Southern expressed his view on each of the two approaches – first, if the seriousness of KO's offence was put into the balance (being the approach which he favoured) and, second, if it was not (which was the approach subsequently approved by the Supreme Court). It is an oddity of the case that Lord Carnwath found UTJ Southern to have made an unimpeachable assessment when ostensibly applying the wrong test and an unsustainable assessment when ostensibly applying the right test. I need to set out the passages in full.

...

51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in MK (Sierra Leone), and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason

why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

52. However, while recognising the ‘elevated’ nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of ‘very compelling circumstances’ in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving IT (Jamaica), if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of ‘very compelling circumstances’ to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath’s reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.

...

56. The second point focuses on what are said to be the risks of treating KO as establishing a touchstone of whether the degree of harshness goes beyond ‘that which is ordinarily expected by the deportation of a parent’. Lord Carnwath does not in fact use that phrase, but a reference to ‘nothing out of the ordinary’ appears in UTJ Southern’s decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold ‘acceptable’ level. It is not necessarily wrong to describe that as an ‘ordinary’ level of harshness, and I note that Lord Carnwath did not jibe at UTJ Southern’s use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, ‘ordinary’ is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of “undue” harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being ‘is this level of harshness out of the ordinary?’ they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly encountered pattern. That would be dangerous. How a child will be affected by a parent’s deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of ‘ordinariness’. Simply by way of example, the degree of harshness of the impact may be affected by the child’s age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child’s emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.
57. I make those points in response to the Appellants’ submissions. But I am anxious to avoid setting off a further chain of exposition. Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent’s deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying KO (Nigeria) in accordance with the guidance at paras. 50-53 above.
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- Note 4 It is of course the second sentence which expresses the wrong approach.
- Note 5 This short passage from Sedley LJ's judgment in Lee is very frequently quoted in the case-law. It expresses an important truth. But it was certainly not intended as a statement that the impact on children of the deportation of a parent will generally be justifiable as a necessary evil, still less as making a full proportionality exercise unnecessary. It is also worth noting he appellant (who already had a criminal record and a bad immigration history) had been sentenced to seven years' imprisonment.
- Note 6 It is not entirely clear, at least to me, what Lord Carnwath understood UTJ Southern to have meant by the words which he emphasised or, therefore, why he emphasised them. But if, as I assume, he was intending to approve those words it would seem to be on the basis that they were to the same effect as his observation in para. 23 that the public interest in the deportation of foreign criminals affords the context for measuring what degree of harshness is justifiable.

48. In TD (Albania) the Court of Appeal considered HA (Iraq) and stated as follows: -

22. The decision in HA (Iraq) does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness. It affirms that this is not what KO (Nigeria), properly understood, requires.

49. In respect of s.117C(6), the Court of Appeal in HA (Iraq) endorsed the decision of the Court of Appeal in NA (Pakistan) at paragraphs 28 - 34. It made further points applicable to the case of a medium offender. The first point is what is described as the underpinning by a fundamental point of principle which the court identifies at paragraph 22 which summarised is the observations of Laws LJ in SS (Nigeria) [2013] EWCA Civ 550, [2014] 1 WLR 998 concerning the significance of the 2007 Act as a particularly strong statement of public policy are equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. The second point is that in carrying out the full proportionality assessment facts and matters that were relevant to the assessment of whether either exception applied are not "exhausted" if the conclusion is that they do not. They remain relevant to the overall assessment and could be sufficient to outweigh the public interest in deportation either, if especially strong, by themselves or in combination with other factors. The third point is that paragraph 33 of the decision, in which it is stated that "the commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient", Underhill LJ in response states at paragraph 34 that, "it is important to bear in mind that it is directed at the exercise under Section 117C (6). The court was not saying that it would be rare for cases to fall within Section 117C (5)".
50. The fourth point concerns the best interests of any children and the reference to the consequence of criminal conduct. Underhill LJ stated that it should be borne in mind that, as the reference to a "sufficiently compelling circumstance" shows, the final sentence relates only to the exercise under Section 117C (6), the final sentence being, "that is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals ...". With reference to the use of

circumstances being “sufficiently compelling” or “very compelling circumstances” the Court of Appeal stated that, “the effect is clear: circumstances will have to be very compelling in order to be sufficiently compelling to outweigh the strong public interest in deportation. That remains the case under 117C (6)”.

### **Findings and Reasons**

51. The first issue to be considered is whether the impact of separation of the family following the deportation of the Appellant to China would be unduly harsh on his two young children. The applicable that set out in KO (Nigeria) as explained in HA (Iraq). The Court of Appeal in TD (Albania) does not suggest that this is not the correct approach, rather, it endorses it. We must carry out a fact sensitive assessment of the impact of deportation on the Appellant’s children. We have to decide whether the harshness is of a significantly elevated degree so that it outweighs the public interest in deportation without making a comparison between the situation for these children and “a baseline of notional ordinariness.”
52. It is unarguably in the children’s best interests for their father to remain in the UK and for the family to continue to live together as a family unit. There is no reason for us to go behind the Appellant’s evidence the family is close and both parents have an input in the lives of the children. We take into account the unchallenged findings of the First-tier Tribunal. We have taken into account the evidence of the Appellant and his partner that the family has been trying to rebuild their lives since then and the children are beginning to return to normality. We have no reason to believe that the children are not as emotionally attached to the Appellant as they are to their mother. We accept that their young lives will be turned upside down by deportation of their father. We also accept that it would not be possible for the Appellant to visit the UK for some time. We accept that it is likely that the children will be physically separated from their father for a lengthy and uncertain period of time – in contrast to when he was serving a term of imprisonment. We find that the family’s financial situation will be affected because XW will be a single parent. She will endure the difficulties that this entails. These factors alone and cumulatively do not in our view reach the elevated test to establish that the impact of deportation would be unduly harsh. (We find that assertions made about damage to the children’s education are speculative).
53. However, in this case there is an additional factor which we find to be unusual and significant. The two young children were living in a thriving and close-knit family unit up until the date when both parents were imprisoned. At this point their family life was shattered by the criminal conduct of their parents. The two young children were placed in the care of the Social Services for at least six months. We reasonably assume that the children were fostered during this time or placed in a local authority children’s home. We have no expert evidence on the impact on them of having been taken into care; however, we can reasonably infer that the consequences of losing both parents and being placed into care (on children aged 3 and 4 years of age) are devastating and emotionally damaging. We find that it was a significantly traumatic event in their young lives. It is with this in mind that we have to consider whether a second major disruption caused by another separation (this time for an



undetermined period of time) from their father (albeit not their mother) would, together with the factors identified above, meet the elevated test. We attach weight to the fact that the Appellant and his partner returned to the home to resume family life in 2016. Thus, family life resumed 4-5 years ago. We accept that they are still trying to return to normality after such a significant event.

54. We accept that the decision to deport the Appellant will cause significant distress, trauma and chaos for a second time to these young children, now aged 9 and 10. We have conducted a fact specific approach, addressing the reality of the children's situation and the consequences of deportation, taking into account that the test does not involve making a generalised comparison. We do not have expert evidence from a social worker about the impact of deportation on the young children, but we can reasonably infer that having already been placed in care at a young age then having been reunited with their parents in 2016, the impact of deportation would be very severe and bleak for these young children.
55. We remind ourselves that the test is freestanding. The Appellant's criminality is not a factor to be taken into account. We raise this because we were concerned, having considered the sentencing remarks, that the Appellant's involvement in was not quite as his evidence would suggest. It is patently obvious that the offence was not a one off but the employment of illegal immigrants and/or overstayers was an integral part of the Appellant's business. However, the statutory framework applicable prevents us from taking into account the Appellant's criminality when assessing the impact on his children in the context of Exception 2. Mr Tufan did not rely on the sentencing remarks in his written submissions. It is not necessary for us to engage with the submissions as regards s117 C (6).
56. It was not clear to us why the decision of the Secretary of State regarding XW of 22 September 2018 was not brought to the attention of the First-tier Tribunal by either party. Protracted and unnecessary litigation could potentially have been avoided. Parties are reminded of their obligations under Rule 2 of the 2008 Rules.<sup>2</sup> The

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<sup>2</sup> The Tribunal Procedure (Upper Tribunal) Rules 2008

Overriding objective and parties' obligation to co-operate with the Upper Tribunal

2. – (1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it –

(a) exercises any power under these Rules; or

Appellant and XW attended the hearing and gave evidence before the First-tier Tribunal. They were aware at this stage that the Respondent had decided that deportation of XW would be in contravention of EU law; nevertheless, they did not bring this to the attention of the Judge Wilding.

57. Mr Lam raised an argument concerning Zambrano late in the day to which the Respondent has not had the opportunity to respond. In any event, it is without substance. The Respondent has conceded that XW has a derivative right of residence arising from Zambrano. The children would not have to leave the United Kingdom in the event of the Appellant's deportation. They would be able to remain here with their mother. The point is academic because s.117C (5) applies.
58. The appeal is allowed under Article 8 of the 1950 Convention on Human Rights.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Joanna McWilliam

Date 27 July 2021

Upper Tribunal Judge McWilliam

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(b)interprets any rule or practice direction.

(4) Parties must –

(a)help the Upper Tribunal to further the overriding objective; and

(b)co-operate with the Upper Tribunal generally.